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**TESTIMONY OF ELECTRONIC FRONTIER FOUNDATION (EFF)**  
**BEFORE COPYRIGHT OFFICE PUBLIC HEARINGS ON**  
**DIGITAL MILLENIUM COPYRIGHT ACT (DMCA)**

May 19, 2000

The Electronic Frontier Foundation (<http://www.eff.org>) appreciates this opportunity to testify regarding the adverse effects from the prohibition against circumvention of technological protections enacted by the DMCA.

***DVD technology causes to an adverse effect on people's ability to make non-infringing uses of copyrighted works and should therefore be exempted from the DMCA's circumvention ban.***

The licensing terms imposed on DVD technology prevent player manufacturers from offering people the ability to bypass the region codes. The same terms prevent players from making noninfringing copies on traditional VHS tapes or computer hard drives for personal or educational use. People who have attempted to eliminate these restrictions, by making competing DVD players from legitimate reverse-engineering rather than by signing a license, have been sued and enjoined -- under the DMCA -- by major movie studios.<sup>1</sup>

The Content Scramble System (CSS) is deliberately designed to prevent legitimate purchasers from being able to view their own purchased movies. *The region coding scheme used by DVDs prevents individual US residents who purchase DVD movies from anywhere else in the world from simply VIEWING these movies on DVD players sold in the United States.* This diminishes the ability of these individuals to use copyrighted works in ways that are otherwise lawful. In other words, the DMCA is being used to prevent people from watching the movies they own on the machines that they own.

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<sup>1</sup> [http://www.eff.org/pub/Intellectual\\_property/MPAA\\_DVD\\_cases/](http://www.eff.org/pub/Intellectual_property/MPAA_DVD_cases/)  
Universal City Studios, et al v. Reimerdes, Corley and Kazan  
Universal City Studios, et al v. Hughes

The adverse impact on persons outside the US is even greater. A large fraction of the world's movies are created by US movie studios, in the US, and released first on DVD in the US. At that time, persons anywhere in the world are free to purchase these DVDs from US retailers or wholesalers. However, when they arrive, the CSS technical protection measures prevent them from playing. Months later, some of these movies are re-released on DVDs coded for other regions. These re-releases are sold at higher prices than the original US release, particularly in Europe. This delays and diminishes the ability of the entire world's population to use these copyrighted works in ways that are otherwise lawful.

DVDs using region coding serve as a technological restraint on the global trade in copyrighted movies. The leading UK grocery chain, Tesco, started selling discount DVD machines in February 2000. By mid-February they were selling tens of thousands of players from 400 stores, "once Internet sites and electrical magazines showed customers how to change the player to recognize discs from around the world."

Tesco's press release mentions their letter to Warner Home Video "calling for an end to the `unnecessary practice' of zoning - which uses technology to prevent customers from buying DVD discs from around the world to play on machines in the UK. The letter goes on to say that Tesco believes 'This is against the spirit of free competition and potentially a barrier to trade.'" Their World Sourcing Director, Christine Cross, said "If we find a practice that we believe is keeping prices high -- we'll fight to change it so prices come down."<sup>2</sup>

The licensing organization that controls DVD technology, the DVD Copy Control Association has taken steps to exterminate this supply of 'region free' players. Its FAQ says, "In cases where DVD-CCA learns of such products, immediate action is taken through the manufacturer to have the product corrected to conform with the CSS license."<sup>3</sup> Indeed it enforced a contract term on December 31, 1999 that eliminated its licensees' ability to sell computer DVD drives whose region controls were implemented in software.

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<sup>2</sup> <http://www.tesco.co.uk/press/press-00feb17a.htm> & <http://www.tesco.co.uk/press/press-00feb17b.htm>

<sup>3</sup> <http://dvdcca.org/dvdcca/faq.html> & <http://dvdcca.org/dvdcca/rpc.html>

Millions of users of DVD technology have been adversely affected in their ability to make noninfringing uses of copyrighted works. The 'region coding' scheme prevents virtually every commercial DVD from being playable in most regions of the world, raising the prices and reducing the availability of works to legitimate buyers. *This has an adverse effect on the ability of buyers to simply VIEW a work which they have purchased -- the most noninfringing use possible.*

CSS together with the web of laws and contracts around it also eliminate the individual's ability to make noninfringing copies of DVD images. Fritz Attaway, MPAA's Washington General Counsel, declared under oath,<sup>4</sup> "Under the terms of the CSS license, such players may not enable the user to make a digital copy of a DVD movie." The restriction is imposed by contracts, implemented by technology, and enforced by DMCA lawsuits.

There is no balance. CSS does not follow the boundaries of the copyright law. Professors are unable to make excerpts to show their classes. Parents are unable to make VHS copies for their kids' VCRs. Programmers and artists are unable to manipulate the images with their own software. The CSS's blanket prohibition of copies and excerpts throws the baby out with the bath water. *CSS prohibits all fair use copying, as well as all illicit copying. It prohibits all copying.*

Congress expressed its clear intent in Section 1201(c)(1) of the DMCA by stating that "Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title."

According to the DMCA's plain wording the traditional limitations to the copyright holders' exclusive rights shall remain in the digital realm. Congress' choice of the word "shall" indicates its intention is not permissive or optional at the choice of the copyright holder, but rather a mandatory requirement that balance and longstanding traditional doctrines, such as fair use and the First Sale Rule continue to have meaning in the digital paradigm.

There is no debate that Congress intended balance in the DMCA and preservation of traditional copyright principles in the digital world. Congress recognized the inherent dangers in enacting a circumvention ban

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<sup>4</sup> [http://www.eff.org/pub/Intellectual\\_property/MPAA\\_DVD\\_cases/20000114\\_mpa\\_ny\\_attaway\\_pi\\_decl.html](http://www.eff.org/pub/Intellectual_property/MPAA_DVD_cases/20000114_mpa_ny_attaway_pi_decl.html)

and instructed this body to anticipate adverse effects and rule additional classes exempt from the general ban as a remedy.

As the U.S. Supreme Court has explained, fair use serves as a First Amendment safety valve within copyright law. *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 555-60 (1985). Copyright law's fair use privilege fulfills its Constitutional purpose by allowing individuals to copy works for socially important reasons without the permission of the author. Thus granting perfect control to copyright holders would be Constitutionally impermissible. This rule-making is charged with effectuating the DMCA in such a way that it does not violate the spirit of the Constitutional limitations placed on copyright. To find otherwise would allow the DMCA to swallow fair use in clear contradiction to Congress' plain intent in section 1201(c).

At a recent conference at Yale Law School, the MPAA publicly stated that it was the organization's position that an individual should be required to obtain a license before making fair use of a DVD.<sup>5</sup> Clearly, this position cannot withstand legal sanction. *It would be an abuse of intellectual property law to allow the motion picture industry to obtain all of the economic benefits of copyright protection with none of the accompanying social responsibilities.* Technological protection systems such as CSS that prevent the public from exercising their legitimate rights abuse the copyright bargain and should be exempt from the general circumvention ban.

EFF is not spending years in court merely to exonerate one or two individuals, or to enable distribution of a limited software prototype. We are here to establish the principle that the anticircumvention provisions cannot be used to eliminate fair use broadly throughout society. Nor can it be used to eliminate competitors who would offer legitimate access and copying capabilities to a major consumer market. Several lawmakers verified Congressional intent by insisting that the DMCA does not and is not intended to overrule the Betamax Supreme Court case.<sup>6</sup>

Two years ago, there could have been some doubt about whether the ill effects of the CSS system were caused by the existence of the prohibition

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<sup>5</sup> [http://www.eff.org/pub/Intellectual\\_property/MPAA\\_DVD\\_cases/20000503\\_def\\_linking\\_reply.html#Gross](http://www.eff.org/pub/Intellectual_property/MPAA_DVD_cases/20000503_def_linking_reply.html#Gross)

<sup>6</sup> *Sony Corp. v. Universal City Studios* 464 U.S. 417 (1984)

See: <http://www.virtualrecordings.com/betamax.htm>

against circumvention. Certainly the movie studios spent a lot of energy lobbying for these DMCA provisions, but the evidence was circumstantial.

This year it is clear. The movie studios have made a clear and obvious causal connection in their own briefs, tying their motivation in building the CSS system to the technological measures that restrict access and fair use, and then tying those to the DMCA anti-circumvention statute.

The top eight movie studios they themselves declared, in their initial legal briefs:

"Each of the Plaintiffs relied on the security provided by CSS in manufacturing, producing and distributing to the public copyrighted motion pictures in DVD format. ... CSS is a technological measure that (a) effectively controls access to works protected by the Copyright Act, and (b) effectively protects rights of copyright owners to control whether an end user can reproduce, manufacture, adapt, publicly perform and/or distribute unauthorized copies of their copyrighted works or portions thereof.... Thus, [the DMCA] encourages technological solutions, in general, by enforcing private parties' use of technological protection measures with legal sanctions for circumvention and for producing and distributing products . . . that are aimed at circumventing" protection measures like CSS.<sup>7</sup>

To be sure, technology provides opportunity for benefit and abuse on behalf of all parties to the copyright bargain. Individuals engaging in piracy for commercial gain abuse intellectual property and harm society and creators. Likewise, the imposition of technology such as CSS onto the public that prevents creative works from readily passing into the public domain and restricts people from exercising their fair use rights is similarly abusive. The use of such abusive systems that do not uphold their end of the copyright bargain should not be backed-up by force of law, if copyright is to continue to serve as the engine of free expression.

Contrary to the fears expressed by the publishing industry, it is possible to preserve Constitutional values without destroying the value behind creative expression. In its justification for greater control over creative expression,

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<sup>7</sup> [http://www.eff.org/pub/Intellectual\\_property/MPAA\\_DVD\\_cases/20000114\\_mpaany\\_complaint.html](http://www.eff.org/pub/Intellectual_property/MPAA_DVD_cases/20000114_mpaany_complaint.html)

the industry claims the new found phenomena of digital technology leaves copyright holders at the mercy of massive unchecked piracy. While the industry has loudly over-stated any potential harm it might face resulting from digital technology, it quietly looks the other way without mentioning the unprecedented power technology provides to copyright holders to control access and use over creative expression.

The copyright industries' glaringly self-interested suggestion that this committee exempt nothing from the circumvention ban ignores Congress' stated desire that DMCA not effect this nation's core Constitutional values - - such as the creation and dissemination of knowledge, freedom of speech, and promoting democratic values.

It is crucial that this Committee consider the longer societal view in deciding these important issues. ***If you don't have the ability to exercise your rights – then you don't have rights.*** There are greater issues at stake than mere economic interests of a few corporations. Unencumbered access to information is essential to knowledge creation, innovation, and the democratic discourse of a free and healthy society. We must diligently resist the content industry's push to build a legal system that optimizes our children for commercial consumption of creative expression at the expense of their imagination, education, and cultural enrichment.

I'd like to address the unfounded fears expressed by the content industry that any additional exemptions would violate the U.S.' WIPO Treaty obligations. Article 11 of the WIPO Copyright Treaty provides that:

“Contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights ... which are not authorized by the authors concerned **or permitted by law.**”

The DMCA went well beyond what was agreed to among contracting parties to the treaty by granting an additional and completely separate access right. Thus any additional exemptions on that right would have no effect on U.S. treaty obligations under WIPO. Additionally, the plain language of the treaty permits circumvention for fair use.

***The Copyright Office should define an exempted class as "DVD movies". The movie studios stated in court filings that over 1 million copies of such works are sold every week. This is the class of works currently showing adverse effects.***

It would be disingenuous to designate a class such as "DVD movies protected by a region coding system". Since consumers have flocked to hardware and software devices whose region codes can be disabled, and manufacturers are starting to rebel, the movie studios might decide to 'throw region coding overboard' in order to save the rest of their restrictive scheme. A designation that only applied to CSS works with region coding would still enable them to suppress competitors whose equipment provides fair use copying.

Similarly, the industry could evade a ruling against a class such as "DVDs protected by CSS" by merely switching to a different, but equally restrictive, protection system. An improved "CSS2" system already exists, and the industry is actively designing stronger one.

Therefore the entire class of "DVD movies" is threatened with adverse effects within the next three years, and should be exempted from the anti-circumvention provisions of the DMCA.

The movie studios stated in court filings in January that about 4,000 movie titles have been released in the US on DVD, that over five million DVD players have been sold, and that over 1 million copies of such works are sold every week. This is NOT an issue of "individual cases", but broadly implemented system that impacts all segments of society. ***A deliberately designed inability to play the work you purchased is no "mere inconvenience".***

In the comments and testimony provided by the content industry before this proceeding, the charge continues to surface that no one has supplied any evidence of actual harm resulting from the use of such dangerous protection systems we discuss today. I need not remind the Committee of the hundreds of individuals who submitted comments complaining about their inability to simply view or make fair use of DVDs. Additionally, In testimony before this Committee, CCUM described a teaching method using DVD that has become unavailable to educators.

It is imperative that this proceeding recognize that the public's sheer inability to exercise its legal rights with respect to certain types of works because technological protections have been applied is by its mere existence a substantial harm perpetrated against the First Amendment. As the U.S. Supreme Court said in *Elrod v. Burns* 427 U.S. 347, 373 (1976), "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." I encourage the Librarian to weigh the Constitutional considerations into its determination about the societal harm.

Copyright's goal is to create a world full of creators with a rich and thriving public domain where creativity flourishes. In addition to legal protection designed to enable a market for works, creators vitally rely upon ready access to information including a vibrant public domain and the ability to engage in a wide range of legitimate uses including fair use. If copyright is to achieve its objective, society's true creators must continue to be allowed to build upon the works of their ancestors.

Because of the demonstrated widespread adverse impact on noninfringing use including fair use imposed by their technological restrictions, DVD movies should be exempt from Section 1201.

Thank you.